IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31723

THOMAS SHEAHAN,	)	**2008 Unpublished Opinion No. 392**
	)	
Petitioner-Appellant,	)	**Filed: March 6, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Shoshone County. Hon. Fred M. Gibler, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Thomas Sheahan, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Ralph R. Blount, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Thomas Sheahan appeals from the summary dismissal of his application for post-conviction relief. We affirm.

I.
BACKGROUND

Sheahan was convicted on two counts of vehicular manslaughter, Idaho Code § 18-4006(3). The judgment of conviction was affirmed by this Court, *State v. Sheahan*, 126 Idaho 111, 878 P.2d 810 (Ct. App. 1994), and Sheahan subsequently filed an application for post-conviction relief. Sheahan's conviction arose from a one-vehicle crash in the early morning hours of August 20, 1992. A Shoshone County emergency medical technician (EMT) was at the scene of a prior accident when he encountered Sheahan, his brother Billy, and friends Perry Padley and Keith Olson. Sheahan was aggressive and uncooperative with the EMT, and sped away down the Coeur d'Alene River Road with his three passengers. An officer had been dispatched from Wallace to the first accident and was driving up the River Road when the four

left the first scene, headed toward the officer. The EMT identified Sheahan as the driver, with his brother in the front passenger seat, and the other two passengers in the back seat.

> Only four minutes later, Deputy Sheriff Mitch Alexander encountered Sheahan's car, which had been nearly ripped in two after crashing into a lane barrier. Alexander testified that when he stopped at the scene, he observed Sheahan in the driver's seat of the car and Sheahan's brother in the front passenger seat; both were unconscious. Olson had been partly ejected from the car and was dead. Padley had been completely ejected from the car and was found in the middle of the road. He, too, was dead.

Sheahan, 126 Idaho at 112, 878 P.2d at 811. Both Sheahan and his brother were subsequently tested for alcohol. Laboratory tests revealed a blood alcohol concentration in Sheahan's body of .16 percent, while his brother's results showed .14 percent. The presence of marijuana was also detected. Sheahan testified that he was not the driver of the car, but rather he was in the back seat directly behind the driver, and he was ejected from the car during the accident. Nevertheless, the jury found him guilty of both counts of vehicular manslaughter. Sheahan was sentenced to two consecutive terms of ten years determinate, the maximum penalty for both counts.

Sheahan's initial application for post-conviction relief raised three claims, and was filed in July, 1995. The district court appointed the public defender to represent Sheahan, however, upon Sheahan's motion, the public defender was disqualified. Sheahan was appointed conflict-free counsel who represented him until October 1998, when counsel was granted leave to withdraw. A third attorney was appointed to represent Sheahan. Third counsel was granted leave to withdraw in November 1999. The district court denied Sheahan's two subsequent motions for replacement counsel. A notice of intent to dismiss Sheahan's application was issued by the district court in May 2004, and Sheahan responded by filing an amended application for post-conviction relief, which the court accepted. After receiving the state's answer, the district court again issued a notice of intent to dismiss. Sheahan filed a response. Ultimately, the district court dismissed Sheahan's application in November 2004, without an evidentiary hearing. Sheahan appealed and moved the district court for appointment of appellate counsel. The motion for appellate counsel was denied.

II.
DISCUSSION

In addition to the dismissal of his post-conviction claims, Sheahan challenges the district court's denials for appointment of counsel and the length of time that was allowed to pass prior to a decision being rendered on his post-conviction application. We address each in turn.

A. The District Court Did Not Abuse its Discretion by Refusing to Appoint Counsel

Sheahan first contends that the district court erred by repeatedly denying his motions for appointment of replacement counsel on his application for post-conviction relief, and also by denying his motion for appointment of counsel on appeal. The state argues that the district court did not abuse its discretion in denying replacement counsel for the post-conviction action. The state also urges this Court not to consider Sheahan's claim that he should have been appointed counsel on appeal, as Sheahan did not petition the Idaho Supreme Court for appointment of counsel.

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. However, there is no Sixth Amendment right to appointed counsel in a collateral attack upon a conviction. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Fields v. State*, 135 Idaho 286, 291, 17 P.3d 230, 235 (2000); *Follinus v. State*, 127 Idaho 897, 902, 908 P.2d 590, 595 (Ct. App. 1995). The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). In determining whether to appoint counsel pursuant to I.C. § 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Charboneau*, at 793, 102 P.3d at 1112. In its analysis, the district court should consider that applications filed by a *pro se* applicant may be conclusory and incomplete. *See id.* at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the *pro se* applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. If the facts alleged are such that a reasonable person with adequate means would be willing to

retain counsel to conduct a further investigation into the claims, counsel should be appointed. *Swader v. State*, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007).

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Sheahan's second court-appointed post-conviction attorney was granted leave to withdraw due to an inability to communicate with Sheahan or agree on a strategy for the case. Sheahan's third court-appointed post-conviction attorney was also granted leave to withdraw due to Sheahan's unwarranted disparaging complaints against counsel which irretrievably damaged the attorney-client relationship and in addition due to Sheahan's expressed intent to take legal positions that counsel believed to be unwise, frivolous, and not in Sheahan's best interests. Sheahan's subsequent motions for replacement counsel were denied on the basis that his two prior attorneys were allowed to withdraw for cause--a complete inability to work with Sheahan--and because his application for post-conviction relief was deemed to be frivolous. Our determination on the merits of Sheahan's post-conviction claims lead us to agree with the district court that Sheahan was not entitled to appointment of post-conviction counsel before the district court or on appeal. Additionally, we note that a criminal defendant may not compel the court to appoint a new attorney by refusing to cooperate with his existing attorney or by otherwise manufacturing his own conflict. *State v. Priest*, 128 Idaho 6, 11, 909 P.2d 624, 629 (Ct. App. 1995). We conclude the district court did not abuse its discretion by denying Sheahan's motions for appointment of counsel for his post-conviction and appellate cases.[1]

B. The District Court Did Not Err by Issuing Notices of Intent to Dismiss Sheahan's Application for Post-Conviction Relief

---

[1] The record on appeal does not include the transcripts of the September 16, 1998, and November 8, 1999, hearings on counsel's motions to withdraw. In the absence of an adequate record on appeal, the appellate court will not presume error. *State v. Sima*, 98 Idaho 643, 644, 570 P.2d 1333, 1334 (1977); *State v. McConnell*, 125 Idaho 907, 909, 876 P.2d 605, 607 (Ct. App. 1994).

Sheahan appears to argue that the district court erred by issuing notices of intent to dismiss his application because he had not spent $500 granted to him by the district court for investigatory purposes, and because he was working on a second amended petition at the time the second notice of intent to dismiss was filed.

The procedure for dismissing an application for post-conviction relief is set out in I.C. § 19-4906(b). If a district court determines that claims alleged in an application do not entitle an applicant to relief, the district court must provide notice of its intent to dismiss and allow the applicant twenty days to respond with additional facts to support his claims. I.C. § 19-4906(b); *Garza v. State*, 139 Idaho 533, 536, 82 P.3d 445, 448 (2003). The district court's notice should provide sufficient information regarding the basis for its ruling so as to enable the applicant to supplement the application with the necessary additional facts, if they exist. *Newman*, 140 Idaho at 493, 95 P.3d at 644. Failure to provide the requisite notice compels reversal of a judgment denying the application for post-conviction relief. *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); *Peltier v. State*, 119 Idaho 454, 456-57, 808 P.2d 373, 375-76 (1991).

The district court issued the first notice of intent to dismiss on May 26, 2004, stating reasons for dismissal with particularity. Sheahan was granted an extension of time to file his response, which he did by filing an amended application for post-conviction relief. Adopting substance over defects of form, the court allowed the amended application and ordered the state to answer. The district court issued a second notice of intent to dismiss on October 12, 2004, stating reasons to dismiss each of Sheahan's twenty-five claims with particularity, and giving him twenty days to respond. After Sheahan filed his response, a final order of dismissal was entered by the court on November 4, 2004.

Sheahan's claim that he was formulating a second amended application provides no relief, nor does the fact that he had not exhausted his investigative funds. There is no right to amend an application once it has been filed. I.C. § 19-4906(a) ("The court *may* make appropriate orders for amendment of the application.") (emphasis added). Sheahan's blanket statement that additional claims may be added once counsel is appointed does not qualify as a permissive request for leave to amend. *Cole v. State*, 135 Idaho 107, 111, 15 P.3d 820, 824 (2000). Furthermore, an applicant for post-conviction relief should raise all issues and claims in the original application. I.C. § 19-4901(b). Although supplements and amendments are permissible, piece-meal applications are not favored and may invoke waiver and forfeiture

provisions set forth in the Idaho Post-Conviction Procedure Act. *Parsons v. State*, 113 Idaho 421, 426, 745 P.2d 300, 305 (Ct. App. 1987). We conclude there was no error in the issuance of the notices of intent to dismiss.

C. The District Court's Order Summarily Dismissing Sheahan's Application for Post-Conviction Relief Was Proper

Sheahan's amended application for post-conviction relief raised twenty-five claims of alleged error, which the district court summarily dismissed. Sheahan asserts that he raised genuine issues of material fact on each claim, entitling him to an evidentiary hearing. He further contends that any deficiencies in his application are due to the district court's repeated denials of his motions for appointment of counsel.

An application for post-conviction relief initiates a proceeding which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). As with a plaintiff in a civil action, the applicant must prove by a preponderance of the evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action, however; an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records, or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *State v. Ayala*, 129 Idaho 911, 915, 935 P.2d 174, 178 (Ct. App. 1996).

Idaho Code Section 19-4906 authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819

P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the party opposing summary dismissal. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). Summary dismissal is appropriate where the record from the criminal action or other evidence conclusively disproves essential elements of the applicant's claims. *Chouinard v. State*, 127 Idaho 836, 839, 907 P.2d 813, 816 (Ct. App. 1995).

1. Issues were not raised on direct appeal

The district court dismissed Sheahan's first eleven claims of error because they could have been raised on direct appeal, and therefore were not properly before the court in the application for post-conviction relief. The Uniform Post-Conviction Procedure Act provides that

> [a]ny issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier.

I.C. § 19-4901(b). The first eleven claims encompass allegations of prosecutorial misconduct, mishandling of evidence, perjury, and improper evidentiary rulings by the trial court. Each of these claims could have been brought in the direct appeal which was decided in 1994; each of the claims was known to Sheahan at the time his direct appeal was filed. These eleven claims could have been brought on direct appeal, therefore they were waived and cannot be considered in post-conviction proceedings. *See Hoffman v. State*, 125 Idaho 188, 190-91, 868 P.2d 516, 518-19 (Ct. App. 1994) (refusing to consider issues that should have been raised on direct appeal).

Sheahan further contends that the claims could not have been brought on direct appeal because his attorney would not raise them for him, thus charging ineffective assistance of appellate counsel. A criminal defendant's right to effective representation by counsel extends to all critical stages of the proceedings, including appeal. *Jakoski v. State*, 136 Idaho 280, 285, 32 P.3d 672, 677 (Ct. App. 2001); *Beasley v. State*, 126 Idaho 356, 359, 883 P.2d 714, 717 (Ct. App. 1994); *Flores v. State*, 104 Idaho 191, 194, 657 P.2d 488, 491 (Ct. App. 1983). Appellate counsel, however, is not required to raise every conceivable issue. *See Aragon v. State*, 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988). Rather, appellate counsel is required only to make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Labelle v. State*, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997). There is a difference between refusing to file an appeal, which gives rise to a presumption of prejudice in an ineffective assistance claim, and refusing to raise certain issues on appeal, which does not give rise to a presumption of prejudice. *Jakoski*, 136 Idaho at 285-86, 32 P.3d at 677-78. The failure to make constitutional arguments does not render appellate counsel ineffective. *Aragon*, 114 Idaho at 765, 760 P.2d at 1181. "[T]he constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac*, 456 U.S. 107, 134 (1982). "Neither [*Anders v. California*, 386 U.S. 738 (1967),] nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Contrary to Sheahan's assertions,

> [a] defendant is not entitled to an attorney who agrees with the defendant's personal view of the prevailing law or the equities of the prosecutor's case. A defendant is entitled to an attorney who will consider the defendant's views and seek to accommodate all reasonable requests with respect to . . . preparation and . . . tactics. A defendant is entitled to appointment of an attorney with whom he can communicate reasonably, but has no right to an attorney who will docilely do as he is told.

United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983).

Appellate counsel's failure to raise the first eleven post-conviction claims on direct appeal does not render his assistance ineffective. Indeed, these eleven claims are conclusory and lack merit; it is not ineffective assistance to not raise meritless claims. *Jakoski*, 136 Idaho at 285,

32 P.3d at 677. Sheahan first claims that law enforcement lost exculpatory evidence, specifically the clothing he was wearing the night of the crash. However he provides no evidence that the clothing would have proven he was not the driver, which was clearly contradicted by other evidence presented at trial. The second claim is that the court allowed the prosecution to use an altered recording of the dispatch tape at trial. As discussed below, this claim was disproven by the dispatch operator on duty the night of the accident who testified that the recording was a true and accurate copy of the conversations that night. Third, Sheahan claims the court erred by giving a jury instruction that was misleading and unclear. However, that particular instruction was an accurate statement of the law in Idaho. Sheahan's fourth claim is that the court erred by not inquiring into whether he was competent to stand trial due to his head injuries. This claim is disproven by Sheahan's own testimony at trial that he was not the driver during the crash and his interactions with counsel prior to trial. Fifth, Sheahan alleges that the court rushed counsel into trial unprepared, despite counsel's assurances on the record that he was prepared for trial. Sixth, Sheahan challenges the chain of custody of the blood draw taken from him, alleging that the prosecutor tampered with the blood sample. However, the chain of custody for the sample was adequately established at trial, as discussed further below.

Sheahan's seventh claim is that a witness for the prosecution perjured himself during the trial, specifically referring to the length of time that passed between Sheahan and his passengers leaving the first accident and Deputy Alexander's discovery of the second accident. Sheahan does not identify the allegedly perjured statements, nor does he provide any evidence that the prosecution knew any testimony was false. Eighth, Sheahan claims that his trial attorney was not licensed to practice law in Idaho at the time of the trial. This is disproven by the record and Sheahan's own documentation, as discussed below. Ninth, Sheahan alleges that the court withheld exculpatory evidence from Sheahan, again referring to the clothes he was wearing the night of the crash. Sheahan does not indicate how the court could have provided evidence that law enforcement officers purportedly lost. Furthermore, this claim was already addressed in claim one. The tenth claim alleges that the court appointed an attorney who had an imputed conflict of interest, despite the court's finding on the record that no such conflict existed. This claim is discussed in more detail below. Sheahan's eleventh and final claim is that the court erred by allowing testimony despite counsel's objections. Sheahan objected to testimony regarding the presence of cannabinoids in his blood after the crash. However, this testimony was

relevant as to the question of whether Sheahan was driving under the influence of drugs or alcohol, and therefore properly admitted.

The district court did not err in dismissing these first eleven claims as they could have been pursued on direct appeal, but were not, causing them to be forfeited and falling outside the scope of post-conviction relief. Furthermore, appellate counsel was not ineffective for failing to raise these claims on direct appeal. Many of these claims were also raised by Sheahan as the basis for ineffective assistance of trial counsel, discussed next.

2. Ineffective assistance of trial counsel claims

The district court also dismissed the fourteen claims remaining in Sheahan's amended application for post-conviction relief. These claims all allege ineffective assistance of counsel and were dismissed for failure to show either deficient conduct by an attorney or prejudice to Sheahan. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Initially, we note that the brevity with which the claims were set forth in Sheahan's amended application renders the claims unsupported and conclusory. Nevertheless, we address the merits of each claim.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Strickland*, 466 U.S. at 687-88; *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon*, 114 Idaho at 760, 760 P.2d at 1176. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better. *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

a. Failure to pursue exculpatory evidence

Sheahan claims that his trial attorney should have pursued evidence which would show he was ejected from the vehicle during the crash. To support his claim, Sheahan cites to portions of the transcript discussing the clothes he was wearing that night which were taken by the police for testing. He also refers the court to the affidavit of his brother, the only other person to survive the crash, who made an unsubstantiated claim that Sheahan was ejected from the car. At no point does Sheahan indicate how counsel's performance was deficient, or show prejudice as a result of counsel's actions. Even if counsel had obtained a lab report regarding testing of Sheahan's clothing, Sheahan has not shown that the results would have changed the jury's verdict. In fact, other evidence was introduced at trial to show that Sheahan wasn't the driver, but the jury clearly rejected that defense theory. The district court properly dismissed this claim.

b. Failure to obtain complete dispatch tape

Sheahan disputes the validity and accuracy of the dispatch tape that was admitted into evidence during his trial. Prior to its admission, the dispatch operator on duty the night of the accident testified that the recording was a true and accurate copy of the conversations related to the events that took place that evening. The state admitted in its answer to Sheahan's amended application that irrelevant portions of the tape were excised prior to trial. Sheahan claims that the full tape would show that thirty minutes elapsed between the time he and his passengers left the first accident and when Deputy Alexander found the second accident. Sheahan's claim is pure speculation, unsupported by any viable evidence. Again, Sheahan has not shown how counsel's failure to obtain that tape resulted in prejudice. The district court properly dismissed this claim.

c. Failure to conduct an accident investigation

Sheahan contends that his trial counsel was ineffective because he failed to pursue an independent expert accident investigation. Instead, trial counsel relied on the state's expert accident reconstructionist at trial. Generally, defense counsel is bound to conduct a prompt and thorough investigation of his or her case. *Richman v. State*, 138 Idaho 190, 193, 59 P.3d 995, 998 (Ct. App. 2002); *Davis v. State*, 116 Idaho 401, 407, 775 P.2d 1243, 1249 (Ct. App. 1989). The course of that investigation will naturally be shaped by a variety of factors, many peculiar to the particular case. *Davis*, 116 Idaho at 407, 775 P.2d at 1249. A decision not to investigate or present mitigating evidence is assessed for reasonableness, giving deference to counsel's judgment. *Richman*, 138 Idaho at 193, 59 P.3d at 998; *see also Wallace v. Ward*, 191 F.3d 1235,

1247 (10th Cir. 1999). The reasonableness of counsels' decision may be determined or greatly influenced by the defendant's statements or behavior. *Wallace*, 191 F.3d at 1247. Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Gee v. State*, 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct. App. 1990).

Prior to trial, Sheahan's first attorney moved the court for fees to hire an expert witness to determine who was driving the vehicle. After a hearing on the motion, the district court granted Sheahan's counsel time to hold a preliminary discussion with a potential expert witness and report back to the court as to what the cost may be and the help that the expert would provide. There is nothing in the record to indicate what transpired after that hearing. Assuming there was no further investigation, there also has been no showing that an independent investigator would have uncovered information which would have changed the outcome of Sheahan's trial. In order to succeed on an ineffective assistance of counsel claim based on trial counsel's failure to procure an expert witness, the accused must assert *facts* that would have been discovered by additional investigation and should offer expert testimony that would have been produced if the funds to hire the experts had been requested. *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127, 148 (1997); *Aeschliman v. State*, 132 Idaho 397, 405, 973 P.2d 749, 757 (Ct. App. 1999). Here, the allegations merely speculate that there may have been other causes for the vehicle accident, such as that a boulder in the road may have caused the accident. The district court properly dismissed this claim.

d. Failure of attorney to be fully licensed to practice law in Idaho

Sheahan claims that the attorney who represented him at trial was not licensed to practice law in Idaho. However, the record indicates that, after an investigation by the Idaho State Bar, it was determined that trial counsel was fully licensed at the time of trial and had not engaged in any wrong-doing with regard to Sheahan. As the claim is disproven by the record, it was properly dismissed by the district court. *Chouinard*, 127 Idaho at 839, 907 P.2d at 816.

e. Failure to challenge chain of custody

Sheahan claims trial counsel was ineffective for failing to challenge the admission of the blood alcohol concentration results. He alleges that the blood sample taken from him was handed directly to the county prosecutor and this somehow interrupted the chain of custody, invalidating the blood sample. At trial, however, Deputy Alexander testified that Evonne

Overacker withdrew Sheahan's blood and Deputy Alexander then locked it in his patrol vehicle until he could deliver it to the lab. Overacker testified that she handed the blood directly to Deputy Alexander after sealing the test kit. At no time did either Deputy Alexander or Overacker mention the presence of the county prosecutor in the room while the blood was being drawn or that he ever handled the blood outside the chain of custody.

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*; *see also Sanchez v. State*, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995); *Huck v. State*, 124 Idaho 155, 158-59, 857 P.2d 634, 637-38 (Ct. App. 1993). Even if Sheahan's trial counsel had brought a motion *in limine* to exclude evidence of the blood alcohol concentration results based on an alleged problem in the chain of custody, it would not have been successful; chain of custody was satisfactorily established at trial and the evidence was properly admitted. Counsel was not deficient by failing to challenge the chain of custody on Sheahan's blood draw, and the claim was properly dismissed by the district court.

f. Representing Sheahan despite conflict of interest

The first trial attorney appointed to represent Sheahan was granted permission to withdraw based on a conflict between her and Sheahan. Sheahan believed the attorney was colluding with law enforcement against him creating a trust issue. The court subsequently appointed an attorney who worked for the same firm as the first trial attorney to represent Sheahan. Due to the fact that these two attorneys were partners, Sheahan alleges that the conflict of interest between Sheahan and his first attorney extends to the second attorney, and therefore the second attorney rendered ineffective assistance due to the ongoing conflict.

Although Sheahan's first and second trial attorneys were not employed by the county as public defenders, both were available to perform the duties of public defender when a conflict existed. In essence, they were both acting as public defenders while representing Sheahan. This Court recently addressed the issue of imputation of conflict between attorneys working as public defenders. *See State v. Cook*, 144 Idaho 784, 791-94, 171 P.3d 1282, 1289-92 (Ct. App. 2007).

In *Cook*, this Court adopted the rule that cases must be reviewed on an individual basis to determine if the conflict would hamper an attorney's ability to effectively represent a client--whether a defendant's right to counsel is threatened by competing interests. *Id.* at 794, 171 P.3d at 1292. The court must look for "a potential conflict of interest *and* a significant likelihood of prejudice." *Id.* at 793, 171 P.3d at 1291 (quoting *State v. Bell*, 447 A.2d 525, 529 (N.J. 1982)). *Per se* imputation of a conflict of interest between public defenders was rejected because it would significantly impair the county's ability to provide legal representation for indigent clients. *Id.* at 794, 171 P.3d at 1292. There is no incentive, economic or otherwise, for diminished advocacy in cases where some conflict exists with one public defender, but not with another. *Id.*

The trial court specifically held that while the conflict between Sheahan and his first attorney provided cause for her to withdraw, it "in no ways otherwise impacts upon the merits of the case or conflicts of interest with respect to any other person or party, defendant or otherwise." During this same hearing the court appointed Sheahan's second attorney, with the understanding that no conflict transferred from the first lawyer to the second. The fact that a client does not agree with his attorney on a variety of subjects does not create a conflict of interest. *Jones v. State*, 125 Idaho 294, 299, 870 P.2d 1, 6 (Ct. App. 1994). Since there was no conflict of interest, in the technical meaning of the term, between Sheahan and his first trial attorney, there could be no prejudice in order to impute the conflict to the second attorney appointed to represent Sheahan. The district court properly dismissed this claim.

g. Failure to call Billy Sheahan as a witness

Towards the end of the defense case, trial counsel for Sheahan called his brother Billy Sheahan as a witness for the defense. Billy immediately informed the court that he was uncomfortable testifying until he consulted an attorney because "these guys are liable to come up with another story and I'll be sitting over there next week." He then refused to answer any relevant questions, asserting his Fifth Amendment right against self-incrimination. The prosecutor on the case then offered Billy immunity for his testimony, which was explained in detail to mean that the prosecutor would not use anything from Billy's testimony against him if charges were brought at a later time. Billy still refused to answer questions without first speaking with a lawyer. An attorney agreed to speak with Billy. Both Sheahan's attorney and the prosecutor later agreed that neither of them would be calling Billy back to the stand due to

the fact that the prosecution obtained a statement from Billy that was not disclosed to the defense during discovery, and if it had been disclosed, the defense would not have called Billy as a witness at all. Sheahan alleges that his trial counsel was ineffective in deciding not to call Billy as a witness, after all.

It is well settled that when the choice of which witnesses to call during trial is a matter of trial strategy, this Court will not second-guess on appeal. *State v. Chapman*, 120 Idaho 466, 469, 816 P.2d 1023, 1026 (Ct. App. 1991). Furthermore, in order to show ineffective assistance of counsel by failure to call a witness, the applicant must show what the proposed testimony would have been, and the advantage it would have provided at trial. *Jones*, 125 Idaho at 297, 870 P.2d at 4. Billy's affidavit is sparse at best, lacking any statement of proposed testimony and how it would have been advantageous at trial. There is also no showing that this testimony would have changed the jury's verdict. Accordingly, the district court properly dismissed this claim.

h. Failure to object to a jury instruction

Prior to closing argument, the district court reviewed the proposed jury instructions with the prosecutor and Sheahan's attorney, both on and off the record. Objections were raised and ruled on, and the final list of instructions was approved by both attorneys. Sheahan claims that his attorney's failure to object to a specific instruction was ineffective assistance. The instruction at issue states that "it is not a defense to a criminal charge that the deceased or some other person was guilty of negligence which was a contributory cause of the death involved in the case." When faced with an objection as to one jury instruction, this Court reviews all of the instructions to ascertain whether, when considered as a whole, they fairly and accurately present the issues and state the applicable law. *State v. Zichko*, 129 Idaho 259, 264, 923 P.2d 966, 271 (1996). To begin with, the instruction Sheahan objects to is an accurate statement of the law: contributory negligence is not a defense in a criminal case. *State v. Taylor*, 67 Idaho 313, 316, 177 P.2d 468, 470 (1947). Taken together, the instructions given to the jury do fairly and accurately present the issues and state the law. No advantage would have been gained by an objection to the above instruction; therefore it was not ineffective for Sheahan's attorney not to object. This claim was properly dismissed.

i. Failure to inform the court that Sheahan's medical condition would cause prejudice at trial

Sheahan alleges that the injuries he sustained during the car crash prejudiced him at trial, and his attorney was ineffective for failing to prevent that prejudice. He does not, however,

relate how those injuries prejudiced him, nor what his attorney should have done to prevent that prejudice. The district court was well aware of the fact that Sheahan was injured in the crash, from his own testimony and that of others, and Sheahan's medical records were admitted into evidence as proof of those injuries. The district court properly dismissed this claim.

j. Failure to file Rule 35 motion

Sheahan claims that counsel failed to file a Rule 35 motion and thereby rendered ineffective assistance. However, this claim is disproven by the record: Sheahan's trial attorney filed a motion for reduction of sentence pursuant to Rule 35, along with a notice for hearing on May 21, 1993. There is no indication in the record before this Court as to what transpired with that Rule 35 motion. However, that question goes beyond Sheahan's allegation of ineffective assistance. The district court's dismissal of this claim was proper, due to the fact that the record disproves Sheahan's assertion of error.

k. Failure to interview known witnesses

Sheahan contends that he specifically told trial counsel about witnesses that may have been helpful to his case, but that none of these witnesses were interviewed or called to testify. To prevail on a claim that counsel's performance was deficient in failing to interview witnesses, a defendant must establish that the inadequacies complained of would have made a difference in the outcome. *Gee*, 117 Idaho at 111, 785 P.2d at 675. It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case. *Id.* We will not second-guess trial counsel in the particularities of trial preparation. *Id.* Sheahan has failed to identify any of the witnesses who should have been interviewed; he has not provided any information as to what their testimony would have been. Without this additional information, it is impossible to conclude that counsel's actions were deficient, let alone that different action would have changed the jury's verdict. The district court properly dismissed this claim

l. Failure to object to use of convictions not pertaining to Sheahan

Sheahan disputes whether certain convictions contained in his criminal record are actually his. He therefore challenges the use of those convictions during a hearing on a motion for release on his own recognizance prior to trial. The motion was denied without a written opinion. Sheahan has not indicated how his attorney's performance was deficient during that hearing, nor has he shown that the outcome of the hearing would have been different if the prior

convictions had not been considered; there is no indication that the motion would have been granted absent those particular convictions. The district court properly dismissed this claim.

In sum, all of Sheahan's claims of ineffective assistance of counsel were properly dismissed by the district court. They failed to raise issues of material fact which would have entitled Sheahan to any of the relief requested. Accordingly, Sheahan's entire application for post-conviction relief was validly dismissed.

D. Delay in Resolving his Application for Post-Conviction Relief

Sheahan filed his initial application for post-conviction relief in July, 1995. The final order of dismissal was not filed until November, 2004, a passage of over nine years. There was significant activity on the claims during five of those nine years, but for nearly four years nothing transpired. After the first denial of a motion for appointment of counsel in late 1999, nothing was filed by Sheahan or the state, and the court took no action until Sheahan again moved for appointment of counsel nearly four years later. According to the records of the district court, this delay arose because the case was closed due to the withdrawal of Sheahan's attorney, with a specific entry in the record that it would be reopened upon Sheahan acquiring new counsel. Although this four-year delay may have been unjustified, it is not an issue which we can address. Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). At no point did Sheahan move the court for a speedy disposition of his claims. By failing to raise this issue with the district court, and failing to take any action to continue his claims, Sheahan has waived the issue for purposes of this appeal.

III.
CONCLUSION

The district court did not abuse its discretion in denying Sheahan's motions for appointment of counsel. It also did not err by summarily dismissing Sheahan's application for post-conviction relief; the claims were either barred because they could have been raised on direct appeal, or they failed to raise issues of material fact which would have entitled him to relief. Sheahan waived his due process issue based on the length of time that passed during the resolution of his post-conviction claims because he raises the issue for the first time on appeal. Summary dismissal is affirmed. No costs or attorney fees are awarded on appeal.

Judge LANSING and Judge PERRY **CONCUR**.